No. 96-454

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ASSOCIATES COMMERCIAL CORPORATION,
Petitioner,

v.

ELRAY RASH and JEAN RASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR MOOTNESS

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The Court granted the petition in this case on January 17, 1997. Upon learning of the Court's decision, respondents filed a motion to dismiss for "mootness." Their "equitable mootness" argument did not, however, arise after certiorari was granted and it does not involve the Court's Article III power to decide this case. Instead, respondents rely upon a prudential doctrine unique to certain kinds of bankruptcies that has no applicability to this case. Accordingly, for the reasons that follow, respondents' attempt to abuse the Court's certiorari process should be rejected and the motion to dismiss should be denied.

1. The facts giving rise to respondents' motion reveal clearly both that respondents could have and should have disclosed their "equitable mootness" argument sooner and that they should now be estopped to make this argument.

Moreover, even if properly preserved, the argument does not support dismissal of this case.

Petitioner filed its petition for certiorari on September 20, 1996. Because this case seemed very likely to be heard by this Court, petitioner sought a stay in the bankruptcy court on October 1, 1996. The purpose of the request for a stay was to stop payments by respondents to unsecured creditors, thereby preserving all parties' interests and rights. As of that date, no unsecured creditors had received any money, except for petitioner.

On October 7, 1996, respondents filed an opposition to the stay and urged the court to permit them to make further payments. In respondent's response filed on October 15, 1996 to petitioner's motion for hearing, respondents urged the bankruptcy court not to stay the order requiring payments because "[a]ssuming that (1) the stay is not granted, (2) unsecured creditors are paid, and (3) the Supreme Court orders that the Rashes pay additional sums under their Chapter 13 plan, only the Rashes are adversely affected by that scenario." App., *infra*, 2a. Indeed, respondents went further and argued that "the failure to grant a stay does not dispossess movant or the other plan participants of any rights, only the debtors. *And the debtors are willing to accept that risk.*" *Id.* at 3a (emphasis added). Thus, prior to their motion in this Court, respondents had unequivocally (and correctly) argued that plan consummation would not moot this case.

On October 14, 1996, respondents voluntarily accelerated payment of the remaining six installments outstanding and the balance owed to unsecured creditors—$6,915.85—to the Trustee to be distributed to unsecured creditors. Thus, instead of protecting themselves from the risk that they would pay too much if this Court ultimately decided this case in petitioner's favor, respondents voluntarily exposed themselves precisely to that risk. The bankruptcy court's order was entered denying a stay on October 16.

Respondents did not file their opposition to certiorari in this Court until December 19, 1996. The opposition made no mention of the expedited payments and no mention of the doctrine of equitable mootness as a basis for denying the petition. Instead, respondents waited for ten days *after* the Court granted the petition on January 17, and while petitioner has been busy preparing its brief on the merits, before seeking dismissal of the writ. As we demonstrate below, under these circumstances, it is clear that respondents' motion should be denied.

2. Without prior notice to this Court, respondents obtained a final order of discharge pursuant to 11 U.S.C. § 1328(a).[1] For reasons known only to themselves, respondents declined either to mention their prepayments in their opposition to Associates' petition for certiorari as a reason for denying the petition or to file a supplemental brief alerting the Court to any "new development." See Rule 15.8 of the Rules of this Court.

Instead, respondents kept their actions a secret, apparently assuming the Court would deny the petition,[2] and hoping to retain the option to argue for dismissal based on "equitable mootness."[3] Under these circumstances,

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[1] Respondents correctly note (Motion 3) that Associates has filed a timely motion for rehearing in response to the bankruptcy court's order of discharge. Thus, even if a truly final discharge order properly could moot a proceeding such as the one here, which for reasons set out *infra* it does not, there is no final non-appealable discharge order in this case. Thus, the motion is manifestly premature.

[2] In opposing Associates' request for a stay from the Bankruptcy Court, respondents asserted that "[t]here is virtually no likelihood, based on historical grant [sic] of writs of certiorari, that certiorari will even be granted." *See* App., *infra*, 2a.

[3] Respondents' suggestion that this is the first available opportunity to bring the matter to this Court's attention is disingenuous. Respondents knew prior to filing their opposition to certiorari that they had accelerated their payments, but never informed the Court of their actions or that they believed the effect of their actions

the Court should invoke Rule 15.2 of the Rules of this Court, which deems waived "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, . . . unless called to the Court's attention in the brief in opposition."[4] The spirit of this Rule is aimed directly at the tactics of respondents, and the policy of protecting the Court's scarce resources reflected in a grant of certiorari strongly supports denying respondents' motion. See *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985).

What makes respondents' new-found mootness suggestion completely untenable is that in their opposition to a stay in the bankruptcy court filed in October 1996, respondents correctly argued that completion of the plan would *not* moot this case and that they were willing to assume the risk that they would have to pay additional sums in the event this Court were to grant the petition and reverse the Fifth Circuit's decision. Apparently, now respondents are no longer willing to accept that risk. Nevertheless, their suggestion (Motion 5-6) that it would now be unfair to them to have the case decided adversely because no stay was ordered is nothing short of astonishing.

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would be to "moot" this case. Thus, respondents violated their duty to "disclose to the Court any and all facts that may raise a question as to mootness even though counsel is of the view that the case is not thereby rendered moot . . . ." Robert L. Stern *et al.*, *Supreme Court Practice* 721 (7th ed. 1993). It was simply improper for respondents to lay in the weeds and leap out with a quasi-mootness argument after certiorari.

[4] As we explain later, the doctrine of equitable mootness, relied upon by respondents is not jurisdictional. It is simply a doctrine based on prudential concerns arising uniquely out of extremely complex Chapter 11 bankruptcy cases. *See* pages 5-6, *infra*; *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 686 (1997); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994).

3. Aside from the lack of equity in respondents' motion, it is absolutely clear that this case is not "moot" within the meaning of Article III. There is a dispute between Associates and the respondents concerning precisely how much the latter owe in order adequately to pay the secured portion of the debt at issue. Under Associates' interpretation of 11 U.S.C. § 502, respondents owed $41,000 in secured claims. The principal difference between what Associates claims as its entitlement and the amount respondents paid under the decisions below is $9,125.00. For purposes of Article III mootness, this dispute is plainly adequate to satisfy the Constitution. See 13A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3533.3, at 262 (1984) ("Claims for . . . monetary relief automatically avoid mootness . . . . Damages should be denied on the merits, not on grounds of mootness"). See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978) (any not "insubstantial" claim for monetary relief defeats mootness); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 216 n.9 (1977). Thus, there is no jurisdictional obstacle to deciding this case.

Indeed, respondents do not actually assert that the Court lacks Article III jurisdiction. This failure to raise a jurisdictional issue alone should be fatal to their motion. See Rule 15.2 and discussion *supra*. Instead, they rely upon lower court decisions, applying the doctrine of "equitable mootness" in complex Chapter 11 bankruptcies to refuse to review an unstayed order that has been relied upon by third parties. See, *e.g.*, *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 686 (1997); *In re Manges*, 29 F.3d 1034 (5th Cir. 1994).[5]

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[5] Even if the requirements for "equitable mootness" were otherwise satisfied, which they are not, there is a very serious question as to whether the doctrine has any applicability outside of the Chapter 11 context. Thus, in *Russo* v. *Seidler*, 44 F.3d 945, 947

These cited cases all involve extraordinarily complicated reorganizations where assets have been transferred, financed post petition or sold, and where courts are reluctant to attempt to unscramble the egg to the detriment of third parties. These cases expressly recognize that this doctrine is not jurisdictional in nature. *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994) ("[t]here is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome (equitable mootness)." (emphasis in original)). Based on these precedents, respondents assert (Motion 5) that, because their Chapter 13 plan is "substantially consummated," the Court should now dismiss the petition in this case.

The issue is not, however, whether the plan is substantially consummated, but rather whether this Court still can "grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). The answer to that question is plainly yes. If the Court decides that Associates is entitled to additional payments to protect its secured interest, then respondents can be ordered to pay that amount. There simply is no basis to doubt that effective relief remains available, which means that the case is not moot in any sense of the term under this Court's decisions.[6]

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n.3 (11th Cir. 1995), the court of appeals rejected an argument that the "substantial consummation" standard, which respondents invoke here (Motion 5), applies to Chapter 13. The logic of this limitation dovetails with Associates' argument in text, which is that the remedy of requiring the debtor to pay more to the secured creditor is an available remedy in this and probably every other Chapter 13 case and therefore the equitable mootness doctrine simply is irrelevant.

[6] Although the equitable mootness doctrine has no relevance to the case as it comes to this Court at this time, it may not be irrelevant later that debtors have paid certain creditors more than they would have if the courts below had ruled in favor of Associates. Even though respondents informed the bankruptcy court that "the debtors are willing to accept that risk," the court still may consider those payments in deciding precisely how much respondents owe to Associates in this particular case. But that in no way eliminates the need for this Court to decide the basic valuation question presented in the petition and accepted for review by this Court.

At the end of the day, respondents' thirteenth-hour effort to avoid having the valuation issue under § 506(a) of the Bankruptcy Code decided by this Court in this case is much too little and much too late. Respondents' tactics are transparent and should be rejected. The Court properly has jurisdiction over this case and should proceed to decide the question presented in the petition, which the Court already has granted for plenary review.

CONCLUSION

For the foregoing reasons, the motion to dismiss for mootness should be denied.

Respectfully submitted,

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February 5, 1997

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APPENDIX

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. 92-10305A

IN RE ELRAY and JEAN RASH

ASSOCIATES COMMERCIAL CORP.,
VS. *Movant*

ELRAY and JEAN RASH,
Respondents

RESPONDENTS' REPLY TO MOVANT'S EMERGENCY MOTION FOR STAY OF ORDER PENDING APPEAL AND REQUEST FOR EXPEDITED HEARING

Notwithstanding continuing procedural difficulties in the form of its motion, and reserving the right to continue to contend that that motion is procedurally defective, come now respondents, debtors, Elray and Jean Rash, and in opposition to the Emergency Motion for Stay of Order Pending Appeal and Request for Expedited Hearing of movant, Associates Commercial Corporation, would show this Court as follows:

1. In response to paragraph 1 of that motion, paragraph 1 suffers primarily from its omissions. Movants did seek a stay of this Court's final orders pending its appeal but failed to seek a stay in the District Court when this Court refused to stay its final orders, pending its appeal to the District Court. Furthermore, movant

subsequently failed to seek a stay of the District Court's final order in this case, and did not seek a stay of the District Court's final order when it appealed that final order to the Fifth Circuit. When the Fifth Circuit ruled en banc, movant failed in a timely fashion to follow customary procedure and seek a stay of that Court's judgment or mandate and then subsequently took the extraordinary step of asking the Fifth Circuit to recall its mandate. The Fifth Circuit has since declined to recall its mandate and the mandate has issued and arrived in this Court. Respondents would further take issue with movant's statement in paragraph 1 of its motion that there is a likelihood of success on the merits in the Supreme Court. There is virtually no likelihood, based on historical grant of writs of certiorari, that certiorari will even be granted.

2. With respect to paragraph 2 of the motion, respondents agree that unsecured creditors will shortly begin to receive their distributions. Their patience is admirable. Movant goes on to state that granting a stay would not harm other parties. It is unclear from the motion whether movant includes the unsecured creditors in the category of "other parties" but it is clear that the unsecured creditors will be harmed by movant's motion. Even considering movant's suggestion of bonds, escrow and interest, the unsecured creditors are entitled to begin treatment under the plan. More importantly, movant mischaracterizes the equities in such a stay. Assuming that (1) the stay is not granted, (2) unsecured creditors are paid, and (3) the Supreme Court orders that the Rashes pay additional sums under their Chapter 13 plan, only the Rashes are adversely affected by that scenario. The unsecured creditors will receive greater distribution than they would have had the Rashes modified their plan to accommodate the greater payments to movant, and the Rashes continue to earn a living and generate income able to be paid to movant the additional awarded sums. This

is not a pie which has stopped growing and can no longer grow. So the failure to grant a stay does not dispossess movant or the other plan participants of any rights, only the debtors. And the debtors are willing to accept that risk.

3. In paragraph 3 of its motion, in its argument, movant starts out with a gross mischaracterization of the rules. Rule 8005 does grant authority to this Court to stay its final order pending appeal but the appeal is no longer pending and Rule 8005 is limited in its application to stays pending appeal. All appellate steps contemplated by Rule 8005 are now final and this Court has been mandated to enforce its final confirmation order. There is no statutory or rule basis for the relief movant requests today in its motion in all of Title II except under 11 U.S.C. § 105. The 7000 series of the Federal Rules of Bankruptcy Procedure applies in such a proceeding, such a proceeding is an adversary proceeding, and in order for movant to obtain relief under § 105, movant must comply with the procedures in adversary proceedings, including filing an adversary proceeding, paying the filing fee, serving respondent and otherwise complying with the rules of procedure for adversary proceedings found in the 7000 series of the FRBP. Because the rights of the unsecured creditors under debtors' plan of reorganization and the administration of the plan generally are adversely affected by such a proceeding, the cause would not be allowed to proceed without joinder of all necessary parties including all unsecured creditors and the Chapter 13 trustee and so, even if this Court is willing to proceed without invoking the 7000 series of rules governing adversary proceedings, this Court should, at a minimum, not grant the relief requested without an adequate demonstration that all unsecured creditors have been served with a copy of this motion and allowed time to file their oppositions.

4. In its paragraph 4, movant cites correctly the grounds for a stay pending appeal but again no appeal is

pending. A petition for a writ of certiorari is not an appeal. If this Court were to grant relief under 11 U.S.C. § 105, the grounds for granting such a relief are dramatically different. They are the general equitable grounds for granting an injunction. Respondents have already demonstrated that movant's rights to payment of any larger sums the Supreme Court may award will not be adversely affected by this Court's refusal to grant a stay. There are no equitable grounds for the granting of an 11 U.S.C. § 105 injunction and this motion should not be granted when no such injunction would be granted if properly filed.

5. In response to paragraph of the motion, respondents have already argued that movant completely mischaracterizes the law when it cites grounds for staying a final order pending an appeal. No appeal is pending. More importantly, the Fifth Circuit has mandated that this Court enforce its final judgment enforcing debtor's chapter 13 plan of reorganization, and absent extremely unusual circumstances, this Court should not feel it has the discretion to ignore that mandate.

6. Respondents would respond to paragraph 6 of the motion by stating that Rule 8005 does not authorize this Court to stay any proceedings or make any other appropriate order when an appeal is not pending.

7. With respect to paragraph 7 of the motion, respondents would note that this argument is an argument for the Supreme Court. This Court should note that no attorney can ever represent to it that the grant of a writ of certiorari by the United States Supreme Court is ever likely.

8. With respect to paragraph 8 of the motion, respondents would reply that movant fails to recall its briefs and arguments before the Fifth Circuit. Respondents argued that wholesale value was the only appropriate measure of fair market value. Movant argued that its foreclosure value (if claimed it did better than most when it repossessed vehicles) was the only appropriate measure of

value. *Associates Commercial Corporation v. Rash*, 90 F.3rd 1036 (5th Cir. 1996) (*en banc*), agreed that wholesale value did reasonably represent fair market value and in dicta observed that a debtor might make out a case that foreclosure value was the appropriate standard. The Rashes never offered testimony as to the foreclosure value of the collateral. Their appraiser testified as to its wholesale value. *Taffi v. United States*, No. 94-55011 & 94-55019, —— F.3rd ——, 1996 WL 535055 (9th Cir. Sept. 17, 1996) is not contrary to *Rash*. It holds that fair market value and not foreclosure value is the appropriate valuation standard. But *Taffi* is totally contrary to the position and arguments of movant before the *en banc* Fifth Circuit. While respondents have not decided whether to oppose movant's petition for writ of certiorari, they are reasonably certain that the Ninth and the Fifth Circuits are not split. They would further note that while other Circuit panels have reached other conclusions, no other Circuit has taken an *en banc* position.

9. In response to paragraph 9 of the motion, respondents would state that while a split among the Circuits is a grounds for the grant of a writ of certiorari, again no attorney can colorably represent to any Court that the grant of a writ of certiorari is reasonably probable. Movant offers to this Court the vote tally of the *en banc* Fifth Circuit. Interesting background for a possible motion to reconsider (which motion was never filed), but unlikely to make any difference to the Bankruptcy Courts now mandated to comply with the Circuit's decision.

11. In response to paragraph 11, respondents would note that movant, having failed at every possible procedural step to obtain appropriate FRBP Rule 8005 stays, now advances the possibility that its petition for writ of certiorari may become moot. Final judgments not stayed can have that effect. But that is irreparable harm only to the extent that all lost causes resulting in final, non-appealable judgments, constitute irreparable harm to the loser. That results from that quirk of our judicial system

which occasionally causes some parties to win and some to lose. But the harm that results from losing cannot and should not be enjoined. The citation to *In re Westwood Plaza Apartments,* 150 B.R. 163 (Bankr. E.D.Tex. 1993) is particularly inappropriate. That case deals with the grounds for granting a stay pending appeal. No appeal is pending.

12. In response to paragraph 12: The failure of the unsecured creditors to receive the distributions called for by the reorganization plan is substantial harm regardless of whatever bond and interest arrangements movants may make. They are not parties to this motion, have not been served a copy of this motion and have been afforded no opportunity to reply.

13. The Fifth Circuit has already responded to paragraph 13 when it adequately weighed the public interest and then declined to recall the mandate issued after its *en banc* decision. By arguing "public interest" movant is asking this Court to second guess the Fifth Circuit. Whether the Supreme Court will advance the public interest by granting the petition for writ of certiorari is an argument to be made to the Supreme Court. There is a clear, uniform rule now in effect for the Eastern District of Texas and that is all properly this Court should address.

14. In response to paragraph 14, respondents would state that movant is not entitled to a Rule 8005 stay. There is no appeal pending.

15. With respect to paragraph 15 of the motion, respondents understand that the original trial judge in this matter has been assigned to hear this motion. Respondents do not understand why a hearing needs to be scheduled at all. From the pleadings alone it is clear that movant cannot get any motion or Rule 8005 relief but must instead seek a formal injunction under 11 U.S.C. § 105 including the filing of an adversary proceeding, the payment of a filing fee and formal service on all affected

parties including the Chapter 13 trustee and the unsecured creditors and that even then the prospects for injunctive relief are less than remote. There are no facts in dispute in this motion. No Federal Rule of Bankruptcy Procedure precludes summary disposition and denial of this motion.

Wherefore respondents pray this Court deny the Emergency Motion for Stay of Order Pending Appeal and Request for Expedited Hearing.

Respectfully submitted,

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